CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 NOVEMBER 2, 1994 NO. 44

This issue contains:

U.S. Customs Service
T.D. 94–82 and 94–83
General Notice
U.S. Court of International Trade
Slip Op. 94–160 Through 94–163

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 94–82)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved April 6, 1994, to June 22, 1994, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and an approval under Treasury Decision 84–49.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: October 11, 1994.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Amoco Chemical Co.
Articles: Isophthalic acid (IPA)
Merchandise: Metaxylene
Factory: Joliet, IL
Proposal signed: December 15, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: Houston, May 24, 1994

(B) Company: Amoco Performance Products, Inc.
Articles: Xydar thermoplastic/polymer
Merchandise: Biphenol; para-hydroxybenzoic acid (PBHA)
Factory: Augusta, GA
Proposal signed: April 6, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, May 25, 1994

(C) Company: ARCO Chemical Co.
Articles: Propylene glycol; dipropylene glycol; tripropylene glycol
Merchandise: Propylene oxide
Factory: Pasadena, TX
Proposal signed: February 25, 1994
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: Houston, June 16, 1994

(D) Company: Chem-Fleur, Inc.
Articles: Talia 210096 DSPEII; Talia 210096 DSPEIII
Merchandise: Phenylhexanol; hedione
Factory: Port Newark, NJ
Proposal signed: February 17, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, June 16, 1994

(E) Company: Chem-Fleur, Inc.
Articles: Phenylhexanol
Merchandise: Isoprenol (3 methyl-3-butenyl-1-ol)
Factory: Port Newark, NJ
Proposal signed: February 17, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, June 22, 1994

(F) Company: Citrus World, Inc.
Articles: Orange juice from concentrate; frozen concentrated orange juice; bulk concentrated orange juice for manufacturing
Merchandise: Concentrated orange juice for manufacturing
Factory: Lake Wales, FL
Proposal signed: June 7, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, June 20, 1994
Revokes: T.D. 89–81–I

(G) Company: Everfresh Beverages, Inc.
Articles: Various juices and juice beverages
Merchandise: Concentrated orange juice for manufacturing; concentrated white grape juice for manufacturing
Factory: Franklin Park, IL
Proposal signed: December 9, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, May 4, 1994
Revokes: T.D. 93–9–E

(H) Company: Fieldcrest Cannon, Inc.
Articles: Greige goods to be printed; pillowcases, sheets, and other finished bed products
Merchandise: Cotton yarn; printed piece goods
Factories: Kannapolis, Concord, Salisbury & Spencer, NC
Proposal signed: January 18, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, May 4, 1994

(I) Company: Hercules Inc.
Articles: Various resins
Merchandise: Various grades of gum, pale wood, and tall oil rosins
Factory: Hattiesburg, MS
Proposal signed: August 25, 1993
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: Boston, March 3, 1994
Revokes: T.D. 78–254–O

(J) Company: Heublein Inc., d/b/a Heublein Wines
Articles: Pasteurized red fruit juice concentrate
Merchandise: Red grape juice concentrate
Factory: Madera, CA
Proposal signed: January 21, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation): May 26, 1994

(K) Company: Hoechst Celanese Corp.
Articles: Various reactive dyes
Merchandise: Amino pheno-beta-oxyethylsulfone; benzoxazolone
Factory: Coventry, RI
Proposal signed: April 29, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, June 16, 1994

(L) Company: Lykes Pasco, Inc.
Articles: Frozen concentrated cranberry juice cocktail
Merchandise: Unsweetened concentrated cranberry juice
Factory: Dade City, FL
Proposal signed: February 2, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, May 25, 1994

(M) Company: Mead Johnson & Co. d/b/a Bristol-Myers Squibb USPNG
Articles: Videx in tablet and powder form
Merchandise: Didanosine (dideoxyinosine) (ddl)
Factory: Evansville, IN
Proposal signed: December 21, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation), May 13, 1994

(N) Company: Monsanto Co.
Articles: Avadex® BW granular herbicide
Merchandise: 2,3,3-trichloroallyl diisopropylthiocarbamate (TDTC) a/k/a Avadex BW technical
Factory: Muscatine, IA
Proposal signed: February 17, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, May 27, 1994
Revokes: T.D. 87–99–R

(O) Company: PWA DECOR Inc.
Articles: Paper
Merchandise: Rutile titanium dioxide
Factory: Fitchburg, MA
Proposal signed: April 26, 1994
Basis of claim: Used in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): Boston, May 16, 1994
Revokes: T.D. 83–124–O to cover successorship of Litton Business Systems, Inc., Fitchburg Paper Company Div.

(P) Company: Reading Alloys, Inc.
Articles: 40% nickel—60% vanadium master alloy
Merchandise: Fused flake vanadium pentoxide
Factory: Robesonia, PA
Proposal signed: February 24, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Boston, May 5, 1994

(Q) Company: Rhône-Poulenc Inc.
Articles: ALIETTE® fungicide formulations
Merchandise: Aluminum tris (o-ethyl phosphonate) a/k/a Fosetyl-AL technical
Factory: St. Louis, MO
Proposal signed: March 21, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, May 11, 1994

(R) Company: Sanofi Bio-Industries, Inc.
Articles: Food and beverage flavor bases
Merchandise: Concord grape juice concentrate
Factories: Brea, CA; Bridgeport, NJ; Waukesha, WI; Wapato, WA
Proposal signed: February 4, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Long Beach, April 11, 1994

(S) Company: Seneca Foods Corp.
Articles: Food and beverage flavor bases
Merchandise: Red grape juice concentrate
Factory: Prosser, WA
Proposal signed: February 15, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Long Beach, May 4, 1994

(T) Company: Seneca Foods Corp.
Articles: Food and beverage flavor bases
Merchandise: White grape juice concentrate
Factory: Prosser, WA
Proposals signed: February 15, 1994
Basis of claim; Used in
Contract forwarded to RC of Customs: Long Beach, May 4, 1994

(U) Company: Shieldalloy Metallurgical Corp.
Articles: Manganese-aluminum briquettes/tablets; chromium-aluminum briquettes/waffles/tablets
Merchandise: Manganese metal (lump, flake or powder); chromium metal (lump, flake or powder); aluminum powder
Factory: Newfield, NJ
Proposal signed: March 23, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, May 16, 1994
Revokes: T.D. 88–77–S (Shieldalloy Corp.)

(V) Company: SmithKline Beecham Corp.
Articles: Monocid (sterile cefonicid sodium in vials); sterile cefonicid bulk powder
Merchandise: 7-aminocephalosporanic acid (7-ACA); 7-D-Mandelamidocephalosporanic acid, ethanolate (7-MACA); formyl mandeloyl chloride (FOMC); tetrazole sulfonic acid, disodium salt (TSA)
Factory: King of Prussia, PA
Proposal signed: June 10, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Boston, June 22, 1994

(W) Company: Stepan Co.
Articles: Sulfonic acid (Petrostep H-67)
Merchandise: Alkylate MX1945
Factory: Joliette, IL
Proposal signed: February 11, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Chicago, May 4, 1994

(X) Company: Zeneca Inc., Zeneca Pharmaceuticals Group
Articles: Lisinopril dihydrate granulation; Zestril® tablets; Zestoretic® tablets; lisinopril dihydrate tablets
Merchandise: Lisinopril dihydrate
Factory: Newark, DE
Proposal signed: January 24, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Boston, April 6, 1994
Revokes: T.D. 93–9–N (ICI Americas Inc.)

(Y) Company: Zeneca Inc.
Articles: Phenothiazine
Merchandise: Diphenylamine
Factory: Mt. Pleasant, TN
Proposal signed: December 28, 1993
Basis of claim: Used in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): Boston, April 29, 1994
Revokes: T.D. 91–92–N to cover name change from ICI Americas Inc., and new factory location

(Z) Company: Zeneca Inc.
Articles: Karate insecticide
Merchandise; Lambdacyhalothrin a/k/a [1a(S*),3a(Z)]-(±)-cyano (3-phenoxyphenyl) methyl-3-(2-chloro-3,3,3-trifluro 1-propenyl)-2,2-dimethylcyclopropane carboxylate
Factories: North Little Rock & Helena, AR
Proposal signed: March 17, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, May 19, 1994
Revokes: T.D. 93–10–K (ICI Americas Inc.)

APPROVAL UNDER T.D. 84–49

(1) Company: Mobil Chemical Co., Div. of Mobil Oil Corp.
Articles: Ethylene; propylene; butadiene
Merchandise: Propane/propylene mix; refinery gas
Factory: Houston, TX
Proposal signed: October 1, 1993
Basis of claim: As provided in T.D. 84–49
Contract forwarded to RCs of Customs: Houston & New York, June 14, 1994

* * * * * * *

ICI Americas, Inc., operating under T.D. 86–70–N has changed its name to Zeneca Inc.

Norplex/Oak, Inc., operating under T.D.s 81–301–Y, 89–23–V, and 89–81–R has changed its name to Allied Signal Laminate Systems

(T.D. 94–83)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved June 29, 1994, to August 10, 1994, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: October 11, 1994.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Air Products and Chemicals, Inc.
Articles: Aminobutyraldehyde dimethyl acetal (ABAA)
Merchandise: Cyanopropionaldehyde dimethyl acetal (CPAA)
Factory: Wichita, KS
Proposal signed: October 13, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, July 6, 1994

(B) Company: ARCO Chemical Co.
Articles: Propylene oxide; tertiary butyl alcohol; tertiary butyl hydroperoxide
Merchandise: Isobutane; propylene
Factory: Pasadena, TX
Proposal signed: February 25, 1994
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: Houston, July 18, 1994

(C) Company: Canon Virginia, Inc.
Articles: Cleaning blade
Merchandise: Pre-polymer; curative; hot melt tape
Factory: Newport News, VA
Proposal signed: April 15, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), August 10, 1994

(D) Company: Carbide Alloys, Inc.
Articles: Cemented tungsten carbide pellets
Merchandise: Cemented tungsten carbide powder
Factory: Columbia, SC
Proposal signed: February 15, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Boston, July 19, 1994

(E) Company: Carboloy Inc.
Articles: Tungsten carbide inserts and blanks
Merchandise: Nonagglomerated metal carbide powders
Factories: Warren, MI; Lenoir, TN
Proposal signed: May 16, 1994
Basis of claim: Used in, less valuable waste
Contract forwarded to RC of Customs: Chicago, July 22, 1994

(F) Company: Chromatic Technologies, Inc.
Articles: Fiber optic cables
Merchandise: Optical fibers; aramid yarns; polybutylene terephthalate (PBT)
Factory: Franklin, MA
Proposal signed: March 19, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Boston, July 26, 1994
Revokes: T.D. 93–42–D

(G) Company: Dryden Oil Co., Inc.
Articles: Marine lubricating oils
Merchandise: Marine oil additive concentrates
Factory: Warminster, PA
Proposal signed: May 31, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, June 29, 1994

(H) Company: Du Pont Agrichemicals Caribe, Inc.
Articles: Tribenuron methyl technical (L–5300); herbicidal formulations of tribenuron methyl (L–5300)
Merchandise: 2-carbomethoxybenzene sulfonyl isocyanate (CMBSI); 1,3,5-triazine, 2-methyl-4-methoxy-6-methylamino (L5296)
Factory: Manati, PR
Proposal signed: March 21, 1994
Basis of claim: Used in
Contract forwarded to RCs of Customs: New York & Miami, July 8, 1994

(I) Company: Elf Lubricants North America, Inc.
Articles: Marine lubricating oils
Merchandise: Marine oil additive concentrates
Factories: Linden, NJ; Rockingham, NC
Proposal signed: May 23, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, June 29, 1994

(J) Company: Fairmount Chemical Co., Inc.
Articles: Hardener No. 3
Merchandise: 4,4′-diaminostilbene-2,2′-disulfonic acid (Flavonic acid; 4,4′ DAS)
Factory: Newark, NJ
Proposal signed: March 29, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, August 10, 1994

(K) Company: General Tire, Inc.
Articles: Fabric; tires
Merchandise: Nylon 6.6 fabric; nylon 6.6 yarn; greige cord 1890 ½
Factories: Barnesville, GA; Bryan, OH; Charlotte, NC; Mayfield, KY; Mount Vernon, IL
Proposal signed: January 28, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, July 11, 1994

(L) Company: Himont U.S.A., Inc.
Articles: Polypropylene homopolymers; polypropylene copolymers; polyethylene homopolymers
Merchandise: Propylene; ethylene; various catalysts
Factories: Pasadena, TX; West Lake Charles, LA
Proposal signed: March 5, 1993
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RCs of Customs: New York & Houston, July 13, 1994
Revokes: T.D. 90–38–M

(M) Company: Keuchel Associates
Articles: Spunfab
Merchandise: Nylon copolymer pellets
Factory: Akron, OH
Proposal signed: February 17, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, July 13, 1994

(N) Company: Lilyblad Petroleum, Inc.
Articles: Marine lubricating oils
Merchandise: Marine oil additive concentrates
Factory: Tacoma, WA
Proposal signed: June 27, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, July 20, 1994

(O) Company: Lubricating Specialties Co.
Articles: Marine lubricating oils
Merchandise: Marine oil additive concentrates
Factory: Pico Rivera, CA
Proposal signed: May 6, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, June 29, 1994

(P) Company: Lunt Manufacturing Co., Inc.
Articles: Magnesium alloy die castings
Merchandise: Magnesium alloy die casting ingot
Factory: Schaumburg, IL
Proposal signed: February 25, 1994
Basis of claim: Used in, less valuable waste
Contract forwarded to RC of Customs: New York, June 29, 1994

(Q) Company: Merck & Co., Inc.
Articles: Imipenem sterile; imipenem milled sterile
Merchandise: Para-nitrobenzyl acetoacetate; diisopropyl-ethylamine; sodium azide; cysteamine HCL; trimethylchloro-silane; dimethyl-formamide; sodium iodide USP special; zinc bromide anhydrous; acetoxyazetidinone
Factories: Danville, PA; Elkton, VA; Rahway, NJ
Proposal signed: December 22, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, August 9, 1994

(R) Company: Paralube, Inc.
Articles: Marine lubricating oils
Merchandise: Marine oil additive concentrates
Factory: Humble, TX
Proposal signed: June 8, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, July 20, 1994

(S) Company: QST Industries, Inc.
Articles: Waistbands; cut pockets
Merchandise: Piece goods
Factory: Mocksville, NC
Proposal signed: February 25, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, June 29, 1994

(T) Company: Rhône-Poulenc Inc.
Articles: RHODOPOL® XGD; RHODOPOL® 50MD
Merchandise: Xanthan gums
Factory: Vernon, TX
Proposal signed: January 19, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, July 13, 1994

(U) Company: Rotuba Extruders, Inc.
Articles: Cellulose acetate plastic pellets
Merchandise: Cellulose acetate ester unplasticized
Factory: Linden, NJ
Proposal signed: March 28, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, July 25, 1994

(V) Company: Shell Oil Co.
Articles: Greases and compounded oils
Merchandise: Stock oils and lube additives
Factories: Metairie, LA; Sewaren, NJ; Portland, OR; Carson, CA: Roxana, IL
Proposal signed: July 7, 1993
Basis of claim: Appearing in
Contract forwarded to RCs of Customs: Houston & New York, July 11, 1994

(W) Company: Uniroyal Chemical Co., Inc.
Articles: PANTERA herbicide
Merchandise: 6-chloro-2-hydroxy-quinoxaline; para toluene sulfonyl chloride; ethyl lactate
Factory: Dayton, TN (an agent operating under T.D.s 55207(1) and/or 55027(2))
Proposal signed: February 8, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, June 29, 1994

(X) Company: Zeneca Inc.
Articles: Paraquat concentrate (paraquat dichloride)
Merchandise: Methyl chloride
Factory: Pasadena, TX
Proposal signed: April 20, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, June 29, 1994
Revokes: T.D. 89–32–L (ICI Americas Inc.)

(Y) Company: Zeneca Inc.
Articles: Fusilade II 125EC
Merchandise: Butyl(RS)-2-(4((5-trifluromethyl)-2-pyridinyl) oxy) phenoxy)propanoate a/k/a fluazifop-p-butyl
Factories: North Little Rock & West Helena, AR
Proposal signed: March 15, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, June 30, 1994

(Z) Company: Zeneca Inc.
Articles: Granular soil insecticides (FORCE)
Merchandise: PP993-tefluthrin
Factory: Omaha, NE
Proposal signed: June 17, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, July 22, 1994
Revokes: T.D. 91–86–G (ICI Americas Inc.)

U.S. Customs Service

General Notice

19 CFR Part 111

ANNUAL USER FEE FOR CUSTOMS BROKER PERMIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of due date for broker user fee.

SUMMARY: This is to advise Customs brokers that for 1995 the annual user fee of $125 that is assessed for each permit held by an individual, partnership, association or corporate broker is due by January 3, 1995. This announcement is being published to comply with the Tax Reform Act of 1986.

DATE: Due date for fee: January 3, 1995.

FOR FURTHER INFORMATION CONTACT: Gary Rosenthal, Entry Operations Branch, (202) 927–0380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub.L. 99–272) established that an annual user fee of $125 is to be assessed for each Customs broker permit held by an individual, partnership, association or corporation. This fee is set forth ion the Customs Regulations in section 111.96 (19 CFR 111.96).

Section 111.96, Customs Regulations, provides that the fee is payable for each calendar year in each district where a broker has a permit to do business by the due date which will be published in the Federal Register annually.

Section 1893 of the Tax Reform Act of 1986 (Pub.L. 99–514), provides that notices of the date on which payment is due of the user fee for each broker permit shall be published by the Secretary of the Treasury in the Federal Register by no later than 60 days before such due date. This document notifies brokers that for 1995, the due date for payment of the user fee is January 3, 1995. It is expected that annual user fees for brokers for subsequent years will be due on or about the 3rd of January each year. This is a change from the previous date of on or about the 15th of the year.

Dated: October 18, 1994.

GEORGE J. WEISE,
Commissioner of Customs.

[Published in the Federal Register, October 21, 1994 (59 FR 53086)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–160)

LACLEDE STEEL CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HYUNDAI PIPE CO., LTD., KOREA STEEL PIPE CO., LTD., AND PUSAN STEEL PIPE CO., LTD., DEFENDANT-INTERVENORS

Consolidated Court No. 92–12–00784

[Remanded to U.S. Department of Commerce, International Trade Administration, for reconsideration of final antidumping duty determination in accordance with instructions provided herein.]

(Dated October 12, 1994)

Schagrin Associates (Roger B. Schagrin, R. Alan Luberda, Damon E. Xenopoulos) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Cynthia B. Schultz);* Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Jeffrey C. Lowe),* of counsel, for defendant.

Morrison & Foerster (Donald B. Cameron, G. Brian Busey, Craig A. Lewis), for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

GOLDBERG, *Judge:* This matter is before the court for review on plaintiff's appeal from the final antidumping duty determination of the United States Department of Commerce, International Trade Administration ("ITA"), regarding circular welded non-alloy steel pipe from the Republic of Korea. *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea,* 57 Fed. Reg. 42,942 (Sept. 17, 1992) *("Final Determination").* Defendant-Intervenors[1] also argue that certain aspects of the ITA's *Final Determination* are unsupported by substantial evidence and not in accordance with law. Together, plaintiff and Defendant-Intervenors raise five primary issues for the court's review. The court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

On October 21, 1991, in response to a petition filed by several U.S. producers including Laclede Steel Company ("Laclede"), the ITA published

[1] Three of the four foreign producers who participated in the investigation have challenged the *Final Determination,* i.e. Pusan Steel Pipe Company, Ltd. ("Pusan"); Hyundai Pipe Company, Ltd. ("Hyundai"); and Korean Steel Pipe Company, Ltd. ("KSP"). The court will refer to these foreign producers collectively as "Defendant-Intervenors". A fourth company, Masan Steel Tube Works Company, Ltd., does not challenge the ITA's *Final Determination.*

a notice of initiation of an antidumping investigation of circular welded non-alloy steel pipe from Korea. *Circular Welded Non-Alloy Steel Pipe From Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela,* 56 Fed. Reg. 52,528 (Oct. 21, 1991). The period investigated was from April 1 through September 30, 1991. 57 Fed. Reg. at 42,943. The ITA conducted verification of Defendant-Intervenors' sales responses in May and June 1992, and of Defendant-Intervenors' cost responses in June and July 1992. *Id.* at 42,942–43. The ITA published its *Final Determination* on September 17, 1992. *Id.* at 42,942. The ITA subsequently amended its final determination to correct a ministerial error. *Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela,* 57 Fed. Reg. 49,453 (Nov. 2, 1992).

DISCUSSION

In this review of the ITA's amended final determination, the court is charged to hold unlawful any determination, finding, or conclusion that is unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted) *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). Furthermore, the "ITA's interpretation of the statute it administers must be reasonable and must not conflict with Congressional intent." *Floral Trade Council v. United States,* 15 CIT 497, 498, 775 F. Supp. 1492, 1495 (1991) (citations omitted).

The following five issues are presented in this appeal: (1) Whether the ITA's determination that home market sales of alleged "overruns" were actually within the ordinary course of trade (and thus should be included within the margin calculations), is supported by substantial evidence in the administrative record and in accordance with law; (2) Whether the ITA's reliance on Defendant-Intervenors' reported weight data for purposes of calculating cost of production ("COP") is supported by substantial record evidence and in accordance with law; (3) Whether the ITA's determination that Defendant-Intervenors were entitled to duty drawback adjustments is supported by substantial record evidence and in accordance with law; (4) Whether the ITA's decision to use revalued depreciation expense data for Hyundai, in accordance with Korean generally-accepted accounting principles ("GAAP"), is supported by substantial evidence and in accordance with law; (5) Whether the ITA's decision to proceed with a separate levels-of-trade analysis is supported by substantial evidence and in accordance with law. For the following reasons, the court sustains the ITA's amended final determination in part, and remands in part.

A. *Alleged "Overrun" Sales:*

1. *Ordinary Course of Trade:*

The first issue presented is whether the ITA's determination that certain alleged overrun Production of pipe was sold in the ordinary course of trade is supported by substantial evidence in the administrative record and in accordance with law. The ITA determined that Pusan and Hyundai failed to prove that their alleged overruns were sold outside the ordinary course of trade.

The ITA compares the prices of subject merchandise sold in the United States ("USP") with the foreign market value ("FMV") of such or similar merchandise. The pertinent statutory provision defines FMV as:

> [T]he price * * * at which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and *in the ordinary course of trade* for home consumption * * *.

19 U.S.C. § 1677b(a)(1)(A) (1988) (emphasis added). The term "ordinary course of trade" is defined as:

> [T]he conditions and practices which, for a reasonable time prior to the exportation of the merchandise which is the subject of an investigation, have been normal in the trade under consideration with respect to merchandise of the same class or kind.

19 U.S.C. § 1677(15) (1988). Defendant-Intervenors bear the burden of proving whether sales used in the ITA's calculations are outside the ordinary course of trade. *Nachi-Fujikoshi Corp. v. United States,* 16 CIT 606, 608, 798 F. Supp. 716, 718 (1992); *see also Koyo Seiko Co. v. United States,* 16 CIT 539, 543, 796 F. Supp. 1526, 1530 (1992). Home market sales of overruns which are not sold in the ordinary course of trade are excluded from the ITA's calculation of FMV. *See Mantex, Inc. v. United States,* 17 CIT ____, 841 F. Supp. 1290, 1305–09 (1993). Overrun sales which are, however, made in the ordinary course of trade, are included in the pool of products eligible to be matched to products sold in the United States.

The court reviews the ITA's ordinary course of trade determination on an individual basis, taking into account all of the relevant facts and circumstances particular to the sales in question. *Mantex,* 841 F. Supp. at 1306 (citation omitted). Among the circumstances which the ITA normally examines in order to determine whether sales of alleged overruns were made in the ordinary course of trade are: (1) Whether the sales in question did, in fact, consist of production overruns or seconds; (2) The comparative volume of sales and number of buyers for such overrun production in the home market; (3) The differences in product standards and uses between overruns and ordinary production; (4) The price and profit differentials between alleged overrun sales and ordinary sales in the home market. *Mantex,* 841 F. Supp. at 1295.

Defendant-Intervenors allege that certain sales of ASTM and KSD pipe to Korean home market customers were overrun sales resulting

from overproduction of pipe needed to fill particular orders. Defendant-Intervenors explain that because they produce pipe to order, any resulting overruns are more difficult to market. Moreover, because only small quantities of overruns result from producing to order, and because overruns are sold at a single metric ton price regardless of their size, pipe overruns are sold at lower prices than merchandise produced to order. *Administrative Record Public Document ("AR Pub. Doc.")* 140, frame 399; *AR Pub. Doc.* 273, frames 1804–05. Defendant-Intervenors therefore argue that their sales of overrun pipe were not made in the ordinary course of trade and should not have been included in the ITA's FMV calculations.

The ITA states that Hyundai failed to present "any evidence whatsoever," and that Pusan presented "inadequate information," to support their claims that the identified sales in question were, in fact, overruns. *ITA Brief* at 15. The ITA argues that many of the sales in question were not overruns because the sales involved pipe built to Korean specification, which would almost always have a demand in the Korean home market. *Id.* at 16. Furthermore, as Defendant-Intervenors concede, there is a ready market for ASTM pipe in Korea. *Memorandum of Points and Authorities in Support of Motion by Defendant Intervenors Hyundai Pipe Co., Ltd. et al., For Judgment Upon the Agency Record ("Defendant-Intervenors' Brief")* at 47. The ITA also argues that the record shows that average sales quantities of allegedly overrun pipe were similar to average sales quantities of pipe sold in the ordinary course of trade. *ITA Brief* at 18. Indeed, in some instances, the volume of alleged overrun sales was larger than the volume of regular commercial sales of the same model. *Id.* Finally, with respect to price and profit differentials, the ITA rejected Hyundai's claim that its ASTM overrun sales were consistently priced below the average price of regular commercial sales, finding it to be unsubstantiated. 57 Fed. Reg. at 42,948; *ITA Brief* at 21.

It does not appear that the ITA fully considered all relevant facts and circumstances particular to the sales in question in making its ordinary course of trade determination. Specifically, the court finds that the ITA's failure to adequately address: the number of home market customers buying alleged overruns; the product standards and uses of alleged overruns; and, the prices and profits on alleged overrun sales, necessitates a remand for reconsideration of these factors. First, in examining the volume of alleged overrun sales, the ITA failed to address whether the alleged overruns were routinely sold to a regular buyer or group of buyers in order to test Defendant-Intervenors' claim that alleged overruns were difficult to market. Second, the ITA failed to address whether, despite the alleged overruns' conformity with Korean or ASTM standards, buyers were in fact utilizing the alleged overruns for different purposes than merchandise sold in the ordinary course of trade. Third, the court finds that the record does not reflect that the ITA examined all relevant information submitted by Defendant-Interve-

nors concerning the pricing of alleged overruns versus products sold in the ordinary course of trade. In particular, the ITA failed to adequately address the evidence which supports Pusan's claim that its alleged overruns were sold at significantly lower prices than sales of the same model sold in the ordinary course of trade.[2] Additionally, in concluding that Hyundai's claim (that alleged overruns were consistently priced below products sold in the ordinary course of trade) was "unsubstantiated," the ITA failed to adequately address evidence to the contrary.[3]

The court therefore finds that the ITA's determination that Defendant-Intervenors failed to prove that any of the alleged overruns were sold outside the ordinary course of trade is not supported by substantial record evidence. On remand, the court directs the ITA to review the data on alleged overrun sales and consider all relevant facts and circumstances contained in the administrative record. Once the ITA has determined which alleged overruns were sold in the ordinary course of trade, if any, it must fully articulate the basis for its determination. All sales found not to have been made in the ordinary course of trade must be excluded from the ITA's calculations.

2. *Treatment of Identical and Similar Matches of Alleged Overruns:*

A subsidiary issue presented is how the ITA should account in its dumping margin calculations for those alleged overruns which are found to have been sold in the ordinary course of trade. Although the ITA determined that alleged overruns should be included in the calculation of FMV, the ITA inadvertently failed to include them in its calculations for the *Final Determination*. The ITA subsequently amended its calculations to include alleged overruns that were *identical* matches to products sold in the United States.[4] 57 Fed. Reg. at 49,453. The ITA determined that incorporating identical matches of alleged overruns into its calculations was a ministerial error capable of being corrected pursuant to 19 U.S.C. § 1673d(e) and 19 C.F.R. § 353.28(d). In its amended margin calculations, therefore, the ITA accounted for both regular and alleged overrun products sold in the Korean market that were identical to products sold in the United States. The ITA further concluded, however, that modification of its calculations to account for overruns which were *similar* matches to United States sales would require more than the correction of a ministerial error. The ITA therefore seeks a court order of remand permitting it to render a decision regarding how to account for alleged overrun sales that may have constituted the "most similar" match in the home market. *ITA Brief* at 23–27.

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[2] *See Verification Exhibit* 21, frames 556–58; *AR Non-Pub. Doc.* 119, frame 860; *AR Pub. Doc.* 140, frame 399; *AR Pub. Doc.* 80 at 8–9.

[3] *See AR Pub. Doc.* 81 at 8–9; *AR Pub. Doc.* 288, frame 2353; *see also AR Non-Pub. Doc.* 132, frame 1269 (ITA internal memorandum regarding overrun sales fails to address price and profit differentials between overruns and sales made in ordinary course of trade). The court does not base its decision on an exhibit which Hyundai claims the ITA apparently forgot to take at verification. *See ITA Brief* at 21 n.9.

[4] Because respondents failed to report sales information for alleged overruns, the ITA programmed its computer to resort automatically to constructed value information in the home market database. The ITA amended its *Final Determination* to reflect this correction. 57 Fed. Reg. at 49,453.

The court agrees that a remand is necessary in order to permit the ITA to address the omission of similar matches from its calculations. On remand, the court directs the ITA to account for alleged overrun sales that it finds were sold in the ordinary course of trade and which constitute "most similar" matches in the home market. The ITA shall clearly articulate the matching methodology it employs, and the results drawn therefrom.

B. *Theoretical versus Actual Weight:*

The second issue before the court is whether the ITA's reliance on Pusan's and KSP's reported weight data is supported by substantial record evidence and in accordance with law. Laclede argues that the steel coil input weights and pipe output weights used to calculate COP and constructed value ("CV") are inaccurate, and thus should have been adjusted or rejected in favor of best information available ("BIA"). *See Plaintiff's Memorandum of Law in Support of Its Motion For Judgment on the Agency Record ("Laclede Brief")* at 15–25. Laclede claims that the industry formula used to convert the standard actual weight of the input coil to the theoretical weight of the finished pipe fails to accurately account for pipe-wall buildup during the production process. Therefore, Laclede argues, the resulting costs (i.e. CV and COP) that are based on these weights are necessarily inaccurate.

The ITA determined that respondents' reported weight data is reasonably accurate, and verified that the data did not significantly distort respondents' actual costs. The ITA made numerous traces to source documents, verified calculations, and obtained extensive documentation. *See ITA Brief* at 34–36 (providing numerous citations to the record). The ITA did acknowledge that "use of the nominal thickness of the coil to calculate the weight of the pipe may under- or over-state the actual weight of the pipe. As such, this calculation may have an effect on cost calculations." 57 Fed. Reg. at 42,945. Nevertheless, the ITA rejected Laclede's argument that Defendant-Intervenors' weights were inherently understated.

In *Avesta Sheffield, Inc. v. United States,* 17 CIT ____, 838 F. Supp. 608 (1993), the court similarly faced the issue of whether the ITA may calculate fabrication costs based on a standard industry formula rather than the true actual weight of the finished pipe. The *Avesta Sheffield* court upheld the ITA's use of respondents' data, noting that: (1) the conversion formula used by respondents to calculate their reported fabrication costs was standard in the industry; (2) respondents' reported data was consistent with the data in respondents' financial records; and (3) petitioner was unable to demonstrate any specific error resulting from such a conversion methodology. *Avesta Sheffield,* 838 F. Supp. at 612–13.

In the present case, the court finds that the ITA's use of Defendant-Intervenors' data and the industry conversion formula is supported by substantial record evidence and in accordance with law. The ITA verified that Defendant-Intervenors' cost information was based on information maintained in their normal accounting records, raw mate-

rial files, inventory records, and production records. Defendant-Intervenors provided detailed examples taken from actual sales records, and explained how they arrived at the conversion factors and how they calculated the theoretical weight. *ITA Brief* at 34. The ITA traced each example to source documentation and discovered no significant problems regarding the accuracy of the weight reported.[5] The court is unpersuaded by Laclede's arguments that Defendant-Intervenors' weight data is inherently unreliable. Although Defendant-Intervenors' costs may sometimes have been under- or over-reported, the court finds no record evidence supporting Laclede's claim that these costs are always underreported. Indeed, the ITA verified that Defendant-Intervenors' approach did not significantly distort Defendant-Intervenors' actual costs. Laclede has failed to demonstrate any error in this regard. For the foregoing reasons, the court holds that the ITA's decision to accept the weight data submitted by Pusan and KSP is supported by substantial record evidence and is otherwise in accordance with law, and, therefore, is sustained.

C. *Duty Drawback/Import Duties:*

The third issue before the court is whether the ITA's adjustment of Defendant-Intervenors' data to account for import duties on raw materials was proper. Defendant-Intervenors argue that they were entitled to an adjustment for duty drawback on pipe exported to the United States because the Korean government had refunded them import duties paid for raw materials used to produce the exported pipe. The ITA agreed that Defendant-Intervenors' claims for duty drawback were valid. Normally, such a finding results in an upward adjustment to USP. In the present case, however, the ITA chose to grant an upward adjustment except in those instances where USP was matched to constructed value. The ITA declined to adjust for duty drawback any United States sale matched to CV, as a BIA penalty for Defendant-Intervenors' failure to report duty-exclusive CV data.

The court will first examine whether Defendant-Intervenors substantiated their claims for duty drawback adjustments. The court will then examine whether Defendant-Intervenors' failure to separate import duties from their CV data justified the ITA's refusal to adjust for duty drawback any United States sale which was compared to CV.

1. *Duty Drawback Adjustment:*

An upward adjustment to United States price ("USP") for duty drawback is provided for by statute in 19 U.S.C. § 1677a(d)(1)(B) (1988); *see also* 19 C.F.R. § 353.41(d)(1)(ii) (1992). The ITA utilizes a two prong test to determine whether a party is entitled to a duty drawback adjustment:

> 1. The import duty and rebate must be directly linked to, and dependent upon, one another.

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[5] *ITA Brief* at 34–35 (providing numerous citations to the record); *see AR Pub. Doc.* 268, frames 1730–31, 1733–34; *AR Pub. Doc.* 269, frames 1749–51; *AR Pub. Doc.* 272, frames 1788–92; *AR Pub. Doc.* 284, frame 2335; *AR Pub. Doc.* 288.

> 2. The company claiming the adjustment must demonstrate that there were sufficient imports of imported raw materials to account for the duty drawback received on exports of the manufactured product.

See, e.g., Avesta Sheffield, 838 F. Supp. at 611. This court has consistently upheld the ITA's two-prong test. *Id.; see Far East Mach. Co. v. United States,* 12 CIT 972, 979, 699 F. Supp. 309, 315 (1988) *("Far East Mach. II"); Far East Mach. Co. v. United States,* 12 CIT 428, 431, 688 F. Supp. 610, 612 (1988) *("Far East Mach. I"); Carlisle Tire & Rubber Co. v. United States,* 11 CIT 168, 171, 657 F. Supp. 1287, 1289–90 (1987); *see also* U.S. Dep't of Commerce, Int'l Trade Admin., *Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change* 26–27 (Nov. 1985). The first prong analyzes the foreign government's export rebate program, while the second prong tests the application of the program to the particular respondent claiming the adjustment. *Far East Mach. II,* 12 CIT at 975 n.4, 699 F. Supp. at 312 n.4. A duty drawback adjustment to USP prevents "dumping margins from arising [simply] because the exporting country rebates import duties * * * for raw materials used in exported merchandise * * *." *Carlisle Tire & Rubber Co. v. United States,* 10 CIT 301, 307, 634 F. Supp. 419, 424 (1986).

It is undisputed that Defendant-Intervenors satisfied the first prong of the test. *See Final Determination,* 57 Fed. Reg. at 42,946. Laclede, however, contests the ITA's conclusion that Defendant-Intervenors satisfied the second prong of the duty drawback test. *Laclede Brief* at 46–51. Specifically, Laclede objects to the ITA's decision to accept Defendant-Intervenors' average duty drawback data, instead of requiring transaction-specific data. *Id.* Defendant-Intervenors reported average duty drawback in this case because they do not maintain such bookkeeping records on a sales-specific basis. *ITA Brief* at 55. Thus, to have collected and submitted transaction-specific duty drawback data, Defendant-Intervenors would have had to manually trace thousands of documents, some of which covered multiple invoices. *See AR Pub. Doc.* 221, frames 2200, 2201. In rendering its *Final Determination,* the ITA noted that the second prong of its test encompasses the principle of drawback substitution. Based upon extensive record evidence addressing duty drawback in this case, the ITA determined that there were sufficient imports of raw materials to account for the duty drawback received by Defendant-Intervenors. 57 Fed. Reg. at 42,946; *see ITA Brief* at 53–55.

This court has consistently held that "there is no requirement that [a] specific input be traced from importation through exportation before allowing drawback on duties paid * * *." *Far East Mach. II,* 12 CIT at 975, 699 F. Supp. at 312; *see also Chang Tieh Indus. Co. v. United States,* 17 CIT ____, 840 F. Supp. 141, 147 (1993); *Avesta Sheffield,* 838 F. Supp. at 612. Indeed, this court has previously upheld the ITA's use of average duty drawback rather than transaction-specific duty drawback as being in accordance with law. *See Carlisle Tire,* 11 CIT at 172, 657 F. Supp. at

1290. Pursuant to the second prong, the only limit on the allowance for duty drawback is that the adjustment to USP may not exceed the amount of import duty actually paid. *Far East Mach. II,* 12 CIT at 974–75, 699 F. Supp. at 311–12. The court acknowledges that adjusting USP on the basis of average duty drawback may result in some sales receiving more or less of an adjustment than was rebated, or even a rebate where none was received. *See Carlisle Tire,* 11 CIT at 172, 657 F. Supp. at 1290. However, the sales-specific tracing requirement proposed by Laclede would eviscerate established substitution principles utilized by the ITA in situations where it would be difficult, if not impossible, to determine whether the raw materials used in producing the exported merchandise actually came from imported rather than domestic sources. *Avesta Sheffield* 838 F. Supp. at 612 (quoting *Far East Mach. I,* 12 CIT at 431, 688 F. Supp. at 612). In this case, the ITA verified that Defendant-Intervenors imported sufficient raw materials to account for the duty drawback received on exports of pipe. *Final Determination,* 57 Fed. Reg. at 42,946. After examining the extensive record on this issue, the court concludes that the ITA's decision to accept average duty drawback data is supported by substantial evidence.[6] For the foregoing reasons, the ITA's determination that respondents submitted sufficient evidence to allow a duty drawback adjustment to USP is supported by substantial record evidence and in accordance with law, and, therefore, is sustained.

2. *Denial of Duty Drawback Adjustment for Failure to Report CV Exclusive of Import Duties:*

The next issue presented is whether the ITA's decision to resort to BIA and deny any duty drawback adjustment to USP when compared to CV is in accordance with law and supported by substantial evidence in the record. The ITA justified its resort to BIA by explaining that Defendant-Intervenors failed to comply with the ITA's request that Defendant-Intervenors report cost of materials ("COM") data exclusive of import duties. *See Final Determination,* 57 Fed. Reg. at 42,951–52. COM is one component of constructed value. The court finds that because the ITA's stated justification is without statutory basis, and because it amounts to a departure from longstanding practice for which the ITA has failed to provide an adequate explanation, the ITA's application of BIA cannot be sustained.

First, 19 U.S.C. § 1677b(e) provides that CV shall include the sum of the cost of materials used in manufacturing such or similar merchandise. This provision explicitly excludes only internal taxes from the cost of materials.[7] This court has previously recognized that the term "inter-

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[6] *See, e.g., AR Pub. Docs.* 80–82; *AR Pub. Doc.* 117, frames 33–37; *AR Pub. Doc.* 140, frames 401–05; *AR Pub. Doc.* 221; *AR Pub. Doc.* 247; *AR Pub. Doc.* 264, frames 920–21; *AR Pub. Doc.* 270, frames 1771–73.

[7] 19 U.S.C. § 1677b(e) defines the constructed value of imported merchandise as the sum of, *inter alia:*

> [T]he *cost of materials (exclusive of any internal tax* applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise * * *. (Emphasis added).

nal tax" denotes taxes other than import duties. *See Serampore Indus. Pvt. Ltd. v. United States Dep't of Commerce. Int'l Trade Admin.*, 11 CIT 866, 869, 675 F. Supp. 1354, 1357 (1987). The ITA has failed to offer any statutory basis for equating import duties with internal taxes for purposes of requiring the exclusion of import duties from reported CV data.

Not only does statute not require the exclusion of import duties from CV, the court also notes that the ITA's longstanding practice has been to require respondents to *include* import duties in constructed value. *See, e.g., Offshore Platform Jackets and Piles From the Republic of Korea,* 51 Fed. Reg. 11,795, 11,796 (Apr. 7, 1986) (ITA's usual practice is to include import duties which would have been waived or rebated upon exportation in CV because such duties are added to USP). Indeed, in this case the ITA initially issued a standard cost questionnaire instructing Defendant-Intervenors that COP and CV data should *include* import duties. *AR Pub. Doc.* 139, frame 353. Subsequently, however, the ITA issued a supplemental questionnaire in which it changed its reporting format and required Defendant-Intervenors to exclude import duties from the overall cost of production for exported products. *AR Pub. Doc.* 249, frame 476. The ITA has failed to provide an adequate rationale for this change in its reporting requirement. While the ITA is afforded great discretion to evaluate and address the facts and circumstances particular to each case in reaching its determinations, this court will not sustain a new reporting requirement absent a rational explanation for the ITA's departure from an established prior practice. *See Citrosuco Paulista, S.A. v. United States,* 12 CIT 1196, 1209, 704 F. Supp. 1075, 1087–88 (1988) (citations omitted).

The ITA's request for duty-exclusive COM data in this case appears to be an unfounded attempt to add a new hurdle to the drawback test that is not required by statute. *Accord Chang Tieh,* 840 F. Supp. at 147. The ITA's determination that respondents fully satisfied the requirements for duty drawback adjustment is in accordance with law and supported by substantial record evidence, and is dispositive of this issue given the ITA's failure to articulate a rationale explanation for its change in methodology. Because the ITA has failed to adequately justify its decision to link Defendant-Intervenors' eligibility for duty drawback adjustments to the reporting of CV data, the court remands this issue and directs the ITA to render a determination granting adjustments for duty drawback on all U.S. sales, including those compared to constructed value.

D. *Korean GAAP and Depreciation Expenses:*

The fourth issue before the court is whether the ITA properly relied upon the revalued depreciation expenses reported in Hyundai's financial statements. Hyundai argues that the ITA should have valued depreciation expenses on a historical basis rather than a revalued basis, because the revalued depreciation expenses are distortive. *Defendant-Intervenors' Brief* at 71–72. Hyundai also argues that valuing its depreciation on a historical basis is consistent with United States and Korean GAAP, and with the ITA's past practice. *Id.* at 55–56, 65–70. The

ITA responds to Hyundai's argument by explaining that calculation of Hyundai's depreciation on a revalued basis is consistent with Hyundai's financial records, Korean GAAP, and with the ITA's practice of applying foreign GAAP principles except where those principles are distortive. *ITA Brief* at 58–70.

The legislative history of the COP statute states that "in determining whether merchandise has been sold at less than cost, [the ITA] will employ *accounting principles generally accepted in the home market of the country of exportation* if [the ITA] is satisfied that such principles *reasonably reflect* the variable and fixed costs of producing the merchandise. H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1973) (emphasis added). This court has upheld the ITA's use of a firm's expenses as they are recorded in the firm's financial statements, as long as those statements are prepared in accordance with the home country's GAAP and do not significantly distort the firm's financial position or actual costs. *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 526, 533 n.12, 717 F. Supp. 834, 841 n.12 (1989); *see Hercules, Inc. v. United States*, 11 CIT 710, 754–56, 673. F. Supp. 454, 490–91 (1987).

Korean GAAP normally requires Korean companies to calculate depreciation expenses based on historical costs. During the POI, however, Korean GAAP permitted a company to revalue its assets pursuant to Article 56–2 of the Tax Exemption and Reduction Control Act.[8] The Korean government permitted companies to revalue their assets in order to encourage companies like Hyundai to offer their shares publicly. *Defendant-Intervenors' Brief* at 56; *Defendant-Intervenors' Reply Brief* at 76. In 1989, in anticipation of its first public stock offering, Hyundai elected to revalue its fixed assets to current market value and record a "revaluation surplus" above and beyond its actual historical cost. *Defendant-Intervenors' Reply Brief* at 76–77; *see AR Pub. Doc.* 268, frame 1729. Existing fixed assets were marked up from their then-depreciated value to current market value; subsequent depreciation on fixed assets would thenceforth be on a revalued basis. *See ITA Brief* at 64–65. Thus, calculation of Hyundai's depreciation expenses on either a revalued basis, i.e. the ITA's methodology, or on a historical basis, i.e. Hyundai's preferred methodology, appears consistent with Korean GAAP.

The court finds that respondents have failed to demonstrate that the ITA's decision to use Hyundai's revalued depreciation expenses is distortive. The verified revalued depreciation expenses were consistent with Korean GAAP and were based on information obtained directly from Hyundai's financial statements. *See AR Pub. Doc.* 283, frame 2328; *AR Non-Pub. Doc.* 129, frame 1252. In addition, use of Hyundai's reported depreciation expenses at historical value would be distortive because such a methodology would overlook the significant impact that

[8] This Act, which was enacted on November 28, 1987, was subsequently abolished, effective December 31, 1990. *Defendant-Intervenors' Memorandum of Points and Authorities In Reply To Plaintiff and Defendant's Memoranda of Law In Opposition To Defendant-Intervenors' Motion For Judgment On the Agency Record ("Defendant-Intervenors' Reply Brief")* at 76 n.151.

revaluing assets has had on Hyundai. The ripple effects caused by revaluation of Hyundai's assets include, *inter alia*, a decrease in tax liabilities due to increased amounts of depreciation; an increase in equity reflected on the company's balance sheets; a potentially enhanced stock value resulting from more available equity; and, an improved ability to acquire debt resulting from an increase in equity. *See ITA Brief* at 65–66. Thus, while Hyundai's depreciation expenses increased as a result of the asset revaluation, other costs, notably financing costs, decreased. Use of depreciation expenses reported on a historical basis rather than on a revalued basis would thus result in a skewed portrayal of cost of production; by isolating one of many variables affecting a company's entire financial picture over a period of time, i.e. depreciation expenses in this case, and subjecting that variable to accounting principles different from those applied to other variables such as financing costs, Hyundai seeks to reap the benefits of revaluation with respect to additional available liquidity, a lower tax liability, etc., and yet turn back the clock to take advantage of diminished depreciation expenses solely for purposes of this antidumping investigation.

Hyundai erroneously argues that the ITA departs from basing depreciation expenses on historical costs only when confronted with companies in hyper-inflationary economies. *See Defendant-Intervenors' Brief* at 68–69. The ITA's cost calculations turn not on the type of economy in which the company is situated, but on whether reported costs are reasonably representative of the costs faced by the company. In hyper-inflationary economies, the rapid escalation of prices means that assets valued at historical costs are necessarily understated, often to a substantial degree. In those cases, the ITA does not base depreciation expenses on distortive historical costs, but on a methodology which provides a more accurate measurement of the costs facing that company during the POI. Similarly, in this investigation, rather than base Hyundai's depreciation expenses on distortive historical costs, the ITA elected to use revalued depreciation expense data because such data more accurately measured Hyundai's costs during the POI. Furthermore, in this case Hyundai voluntarily chose to revalue its depreciation expenses in accordance with Korean GAAP; thus, the ITA used depreciation expense data which was drawn directly from Hyundai's financial records. For the foregoing reasons, the court finds that the ITA's decision to employ revalued depreciation expense data for Hyundai is supported by substantial record evidence and in accordance with law. The ITA's determination is therefore sustained in this regard.

E. *Commercial Levels of Trade:*

The final issue before the court is whether the ITA's decision to compare products according to level of trade is supported by substantial evidence and in accordance with law. The applicable regulation states that calculations of FMV and USP will normally be based on "sales at

the same commercial level of trade." 19 C.F.R. § 353.58.[9] The ITA determines whether different levels of trade exist by examining the type and function (i.e. economic function) of the first unrelated buyers in the chain of commerce. *Ad Hoc Committee of AZ-NM-TX-FL Producers v. United States*, 16 CIT 1008, 1010, 808 F. Supp. 841, 843 (1992) (*"Ad Hoc II"*), *rev'd on other grounds*, 12 Fed. Cir. (T) ____, 13 F.3d 398 (1994). The identification of different levels of trade establishes a rebuttable economic presumption that levels of trade have an impact upon price and, ultimately, upon FMV. *Ad Hoc II*, 16 CIT at 1010–11, 808 F. Supp. at 844. Once discernable levels of trade have been identified, challenging parties bear the burden of rebutting the presumption that prices and selling expenses are correlated to levels of trade.[10] If a party provides sufficient evidence to rebut this presumption, the ITA then applies a correlation test to determine whether it should proceed with an analysis based upon the previously identified functional levels of trade.

As an initial matter, the court finds that the ITA's identification of two levels of trade, i.e. end-users and distributors in the Korean market, is supported by substantial evidence in the record. Defendant-Intervenors argue that there is no discernable correlation between prices and the identified levels of trade. In support, Defendant-Intervenors point to record evidence which demonstrates that if the Korean market is analyzed in the aggregate with respect to sales of merchandise in the relevant class or kind, there are no discernible differences between prices and selling expenses on the one hand, and levels of trade on the other. The government acknowledges this record evidence, but argues that because Defendant-Intervenors rely upon an aggregate analysis (i.e. one which includes both subject and non-subject merchandise), they have failed to rebut the presumption that there is a correlation between price and levels of trade. *ITA Brief* at 74–75; *see Defendant-Intervenors' Brief* at 79–80. The court disagrees.

The court finds that the evidence introduced by Defendant-Intervenors in this case was sufficient to rebut the presumption of a correlation between prices and levels of trade. Once the presumption of a correlation is rebutted by sufficient evidence, the burden shifts from the challenging party to the government; it is then incumbent upon the ITA to conduct its own correlation test, and to base its final determination

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[9] 19 C.F.R. § 353.58 states in full:

> The Secretary normally will calculate foreign market value and United States price based on sales at the same commercial level of trade. If sales at the same commercial level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate foreign market value based on sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise and make appropriate adjustments for differences affecting price comparability.

[10] The ITA's traditional correlation test for level-of-trade analysis has entailed a comparison of prices and functional levels of trade. *See, e.g., Titanium Sponge from Japan*, 57 Fed. Reg. 557, 557 (Jan. 7, 1992); *Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. 21,061, 21,065 (May 22, 1990). Recently, however, the ITA has exercised its discretion by including selling expenses as an additional factor relevant to the correlation test. U.S. Dep't of Commerce, Int'l Trade Administration, *Import Administration Policy Bulletin* 92/1 at 2 (July 29, 1992) (*"Policy Bulletin"*). In this case, Defendant-Intervenors only presented evidence that prices did not vary by level of trade; they failed to present evidence that selling expenses were not correlated to levels of trade. The court notes, however, that the *Policy Bulletin* was issued three months after the preliminary determination in this case. Moreover, the *Policy Bulletin* specifically states that "[t]his policy will be implemented in all *future* cases and outstanding administrative reviews where the necessary information can be gathered and used in the preliminary results without delaying the completion of the review." *Id.* at 3 (emphasis added). Thus, the "selling expenses" factor is not relevant to the present case.

upon the results of that test. *Ad Hoc II,* 16 CIT at 10–11, 808 F. Supp. at 844. The court therefore remands this issue to the ITA; upon remand, the ITA is instructed to conduct its own correlation test, utilizing only the price factor in this case, to determine whether there is in fact a correlation between prices and levels of trade for the subject merchandise. Based upon the results of that analysis, the ITA shall amend its determination accordingly.

CONCLUSION

In conclusion, the court sustains the ITA's amended final determination with respect to two issues, i.e. the ITA's reliance upon Defendant-Intervenors' weight data; and, the ITA's reliance upon the revalued depreciation expenses reported in Hyundai's financial statements. With respect to the three remaining issues, however, the court directs the ITA upon remand to reconsider its determination in accordance with the court's opinion.

First, with regard to the alleged overruns, the ITA shall review the alleged overrun sales to determine whether they were made in the ordinary course of trade, taking into account all of the relevant facts and circumstances particular to the sales in question. The ITA is specifically directed to address: the number of home market customers buying alleged overruns; the product standards and uses of alleged overruns; and, price and profit differentials between alleged overruns and sales made in the ordinary course of trade. The ITA shall fully articulate the bases for the conclusions it reaches. Only those identically matched alleged overruns which are found to have been sold in the ordinary course of trade are to be included in the ITA's calculations. The ITA is further directed to account for alleged overrun sales that it finds were sold in the ordinary course of trade and which constitute "most similar" matches in the home market. The ITA shall provide a full explanation of the matching methodology it employs and the results drawn therefrom.

Second, with regard to duty drawback, the court directs the ITA to render a determination granting adjustments for duty drawback on all U.S. sales, including those compared to constructed value.

Third, the court instructs the ITA to conduct a correlation test, utilizing only the price factor, to determine whether there is a correlation between price and levels of trade for the subject merchandise. The ITA shall fully articulate its methodology and, based upon the results of the test, shall amend its determination accordingly. For the foregoing reasons, it is hereby:

ORDERED that Plaintiff's Motion For Judgment On The Agency Record is granted in part and denied in part; it is further

ORDERED that Defendant-Intervenors' Motion For Judgment Upon The Agency Record is granted in part and denied in part; it is further

ORDERED that the U.S. Department of Commerce, International Trade Administration, shall, within sixty (60) days of the date of this *Memorandum Opinion and Order,* issue a remand determination in accordance with the instructions provided herein; it is further

ORDERED that the parties may, within twenty-five (25) days of the date on which the ITA issues its remand determination, submit memoranda addressing the ITA's remand determination, not to exceed thirty (30) pages in length; and it is further

ORDERED that the parties may, within fifteen (15) days of the date on which memoranda addressing the ITA's remand determination are filed, submit response briefs, not to exceed twenty (20) pages in length.

(Slip Op. 94–161)

ROSS COSMETICS DISTRIBUTION CENTERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–12–00866

[Customs remand determination affirmed in part and reversed in part.]

(Decided October 13, 1994)

Neville, Peterson & Williams (John M. Peterson, Peter J. Allen) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mark S. Sochaczewsky), Susan E. Wilson, Sheryl A. French,* Attorneys, United States Customs Service, of counsel, for defendant.

MEMORANDUM OPINION

DICARLO, *Chief Judge:* Before the court is the remand determination of the United States Customs Service, Ruling Letter 456935 (Nov. 10, 1993), issued pursuant to the court's decision in *Ross Cosmetics Distribution Centers, Inc. v. United States,* 17 CIT ____, Slip Op. 93–151 (Aug. 10, 1993), *modified,* 17 CIT ____, Slip Op. 93–173 (Sept. 1, 1993). Customs' remand determination ruled that certain labels and packages of cosmetic products proposed by plaintiff for importation constitute counterfeit use of United States trademarks and, if imported, would be subject to seizure and forfeiture. Plaintiff renews its Rule 56.1 motion for judgment upon the agency record, challenging Customs decision as arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. The court's jurisdiction in this case is provided by 28 U.S.C. § 1581(h) (1988).

BACKGROUND

Plaintiff, an importer of cosmetics, toiletries, and related products, requested Customs to issue a pre-importation ruling pursuant to 19 C.F.R. § 177.2 (1993), regarding whether its packaging for certain bath oils and fragrance oils proposed for importation conformed with Customs-administered laws and regulations relating to trademarks, trade names, and similar intellectual property rights. Specifically, plaintiff's packages for its bath oil products GORGEOUS, LOVE BIRDS, WHISPER, OBLIVION, OSCENT, and MORNING DREAM bear lan-

guage inviting customers to compare these products to the well-known products of GIORGIO, L'AIR DU TEMPS, OMBRE ROSE, OPIUM, OSCAR, and YOUTH DEW respectively. Plaintiff's products are sold at a fraction of the price of the well-known products.

Customs issued its initial ruling on June 27, 1991, Rul. Ltr. 451142. The Agency held that, because "GIORGIO," "OPIUM," and "YOUTH DEW" are trademarks registered with the United States Patent and Trademark Office (PTO) and recorded with Customs for protection against infringing importation, plaintiff's use of these marks on its packaging constituted a counterfeit use of these marks. Accordingly, plaintiff's products, if imported, would be subject to seizure and forfeiture for violation of 19 U.S.C. § 1526 (1988). Customs also held in its Ruling that it was unable to issue a binding ruling regarding plaintiff's use of other marks not recorded with Customs. The Ruling stated, however, that if these marks were registered with the PTO, articles bearing such marks would be subject to seizure under 19 U.S.C. § 1595a(c) (1988) for violation of 18 U.S.C. § 2320 (1988). Plaintiff filed this action challenging Customs' initial ruling and seeking a judgment upon the agency record. The court issued a decision on August 10, 1993, holding that the Ruling was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Ross Cosmetics,* 16 CIT ____, Slip Op. 93–151. The court held that before Customs could conclude plaintiff's products were counterfeits, Customs must first make a finding that plaintiff's packages were "identical with or substantially indistinguishable from" the registered marks, and that Customs had failed to do so. *Id.* at 6–7. The court also held that the Ruling was arbitrary, because in finding that plaintiff's packages were likely to cause customer confusion, Customs simply compared plaintiff's packages to the facsimile copies of the recorded marks, rather than to the actual packages of the products, or a reasonable reproduction representing the design and color of the trademarks. *Id.* at 7–11. The court further held that, with respect to the unrecorded marks, Customs should investigate whether these marks are registered with the PTO. *Id.* at 16–17, Slip Op. 93–173 at 1. The court remanded the Ruling to Customs for redetermination.

On November 10, 1993, Customs issued its remand determination. The remand determination ruled: (1) plaintiff's products using the trademarks "OMBRE ROSE," "OPIUM," and "OSCAR" are admissible as non-infringing goods; and (2) plaintiff's products using the trademarks "GIORGIO," "YOUTH DEW," and "L'AIR DU TEMPS" are considered to infringe the rights of the respective trademark owners, and constitute a counterfeit use of these trademarks. Because "GIORGIO" and "YOUTH DEW" are recorded with Customs and "L'AIR DU TEMPS" is not, products using the trademarks "GIORGIO" and "YOUTH DEW," if imported, would be subject to seizure and forfeiture under 19 U.S.C. § 1526(e), and products using the trademark "L'AIR DU TEMPS," if imported, would be subject to seizure and forfeiture

under 19 U.S.C. § 1595a(c) for violation of 18 U.S.C. § 2320. *Remand Determination,* at 28.

Plaintiff now contests Customs' remand determination concerning plaintiff's use of the trademarks "GIORGIO" and "L'AIR DU TEMPS." As for "YOUTH DEW," plaintiff claims that the issue has been rendered moot by a stipulation of settlement, dated June 24, 1993, between plaintiff and the trademark owner of "YOUTH DEW," in *Estee Lauder Inc. v. Apple Cosmetics Inc.,* No. 92 Civ. 7969 (S.D.N.Y. June 24, 1993). The stipulation provides that plaintiff "shall permanently cease and desist, directly or indirectly," from using the YOUTH DEW trademark "in comparative advertising in a manner where such trademark [ ] [is] substantially larger than the surrounding text or significantly set off by color or type so as to dominate the surrounding text[.]" A.R. Doc. 5 at 2. Plaintiff states that under the terms of this stipulation, it has agreed to discontinue sales of its product MORNING DREAM. Pl.'s Br. at 26.

Standard of Review

The applicable standard of review is whether Customs' determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 28 U.S.C.A. § 2640(e) (West 1994); 5 U.S.C. § 706(2)(A) (1988).

> The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)).

In reviewing the agency's explanation, the court "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (citations omitted).

Discussion

This court's review will be limited to that part of the remand determination challenged by plaintiff; that is, Customs' decision concerning plaintiff's use of the trademarks "GIORGIO" and "L'AIR DU TEMPS" on the proposed packaging of its products GORGEOUS and LOVE BIRDS, respectively.

1. *The Products:*

a. "GIORGIO" v. "GORGEOUS":

The trademark "GIORGIO" is owned by Giorgio Beverly Hills, Inc., which has three valid trademark registrations with both the PTO and Customs for GIORGIO perfume and toiletry products: (1) the word mark "GIORGIO;" (2) a GIORGIO crest design; and (3) a design of alternating yellow and white vertical stripes. *See* A.R. Docs. 8–10. The

GIORGIO packages use the stripe design as background, and bears the GIORGIO crest and the word mark "GIORGIO" in various styles and sizes. A.R. Docs. 7, 11.

The proposed package of plaintiff's product GORGEOUS invites the consumer to compare GORGEOUS to GIORGIO. The package of GORGEOUS uses diagonal yellow and white stripes as the background. A crest design appears above the name "GORGEOUS." At the top of the front panel is the language "COMPARE TO GIORGIO YOU WILL SWITCH TO * * *," in which the word mark "GIORGIO" is followed by the registered trademark symbol and appears in a bold and larger size print than the rest of the words. At the bottom of the front panel is a disclaimer: "OUR PRODUCTS IS IN NO MANNER ASSOCIATED WITH, OR LICENSED BY, THE MAKERS OF GIORGIO." The word mark "GIORGIO" is again followed by the registered trademark symbol. All words in the disclaimer appear to be in the same size print. A.R. Doc. 2.

b. "L'AIR DU TEMPS" v. "LOVE BIRDS":

The trademark "L'AIR DU TEMPS" is owned by Nina Ricci, S.A.R.L., and is registered with the PTO, *see* A.R. Doc. 15, but is not recorded with Customs. In addition to the word mark "L'AIR DU TEMPS," Nina Ricci has two valid trademark registrations with the PTO, each with a design mark of a swirled glass bottle with a closure, with one topped by one three-dimensional dove, and the second topped by two three-dimensional doves. A.R. Docs. 16, 17. The sample box of L'AIR DU TEMPS[1] shows a yellow background, a golden oval containing two white doves in flight in a prominent position on the front panel, a golden band across the bottom of the front panel, and the word mark "L'AIR DU TEMPS" in gold print between the oval and the band.

The proposed packaging for plaintiff's product LOVE BIRDS has a primarily yellow background with thin white stripes. The front panel of the box shows an orange oval in a prominent position and an orange band across the bottom. The orange oval contains four birds in flight and the words "LOVE BIRDS," all in gold color. At the top of the front panel is the language "COMPARE TO L'AIR DU TEMPS YOU WILL SWITCH TO * * *," in which the word mark "L'AIR DU TEMPS" is followed by the registered trademark symbol and appears in a bold and larger size print than the rest of the words. At the bottom of the front panel and within the orange band is a disclaimer: "OUR PRODUCTS IS IN NO MANNER ASSOCIATED WITH, OR LICENSED BY, THE MAKERS OF L'AIR DU TEMPS." The word mark "L'AIR DU TEMPS" in the disclaimer is also followed by the registered trademark symbol. All words in the disclaimer appear to be in the same size print. A.R. Doc. 2.

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[1] The sample box of L'Air Du Temps Eau de Toilette was submitted by Customs after the remand determination was filed with the court. Defendant states that the sample is representative of the product originally observed by Customs during the remand investigation. Letter from Counsel for Defendant (July 22, 1994). In the remand determination, Customs described the product originally observed as being "primarily yellow with a white oval on the front panel that contains two gold-colored doves in flight." *Remand Determination*, at 23.

2. *Statutory and Regulatory scheme; Customs Policy:*

The applicable statutes in this case are the Trademark Act of 1946 (the Lanham Act), 15 U.S.C. §§ 1051–1127, and sections under title 19 of the United States Code concerning the protection of trademark rights by the Customs Service. In general, goods that infringe the rights of United States trademark owners are not permitted importation; infringing goods are subject to seizure and forfeiture by the Customs Service. *See* 15 U.S.C. §§ 1124, 1125 (1988); 19 U.S.C. §§ 1526(e), 1595a(c).

a. Applicable Statutory Violations:

Section 42 of the Lanham Act, 15 U.S.C. § 1124, forbids importation of any goods that "copy or simulate" a trademark registered with the PTO. "A 'copying or simulating' mark" is either "an actual counterfeit of the recorded mark or name[,] or is one which so resembles it as to be likely to cause the public to associate the copying or simulating mark with the recorded mark or name." 19 C.F.R. § 133.21(a) (1993).

Section 43(b) of the Lanham Act, 15 U.S.C. § 1125(b), forbids importation of any goods "marked or labeled in contravention of" section 43(a). Section 43(a) provides in pertinent part:

> Any person who, on or in connection with any goods * * * or any container for goods, uses in commerce *any word, term, name, symbol, or device, or any combination thereof,* or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (1) *is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association* of such person with another person, *or as to the origin, sponsorship or approval* of his or her goods * * * by another person, or
>
> (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods * * *,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (emphasis added). By virtue of this broad coverage of section 43, Customs' protection of trademark rights extends to all trademarks and trade dresses, regardless of whether they are registered with the PTO or recorded with Customs.

b. Penalties:

Under 19 U.S.C. § 1526(e), any merchandise "bearing a counterfeit mark" imported into the United States in violation of 15 U.S.C. § 1124 "shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws." A "counterfeit" is defined as "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127 (1988).

Under 19 U.S.C. § 1595a(c), any merchandise imported into the United States "may be seized and forfeited" if the merchandise or its

packaging violates section 1124, 1125, or 1127 of title 15 of the United States Code, or section 2320 of title 18 of the United States Code, which imposes criminal liability on any person who intentionally trafficks in counterfeit goods. 19 U.S.C. § 1595a(c)(2)(C).

c. Counterfeit v. Confusingly Similar:

In order to facilitate the enforcement of trademark protection at the border, Customs currently divides trademark infringement cases into two categories: those which bear a "counterfeit" mark, and those which bear a "confusingly similar" mark. *Remand Determination,* at 3–4. A "counterfeit" mark is defined in accordance with 15 U.S.C. § 1127. A "confusingly similar" mark is defined by Customs as one "that is likely to cause confusion, or to cause mistake, or to deceive the consumer as to the origin, affiliation, or sponsorship of the goods in question." *Remand Determination,* at 4. This definition appears to track the language contained in section 43 (a) of the Lanham Act. In addition, Customs draws a distinction between trademarks that are registered and recorded with Customs, and trademarks that are registered but not recorded with Customs. *Id.*

Thus, imported articles bearing "counterfeit" versions of marks recorded with Customs are subject to seizure and forfeiture under 19 U.S.C. § 1526(e). Imported articles bearing "counterfeit" versions of marks not recorded with Customs are subject to seizure and forfeiture under 19 U.S.C. § 1595a(c) for violation of 18 U.S.C. § 2320. *Remand Determination,* at 4.

Imported articles bearing "confusingly similar" versions of marks recorded with Customs are ultimately subject to seizure and forfeiture under 19 U.S.C. § 1595a(c) for violation of 15 U.S.C. § 1124. Imported articles bearing "confusingly similar" versions of marks not recorded with Customs are currently not prohibited for importation. *Id.*

3. *Counterfeit v. Mere Infringement:*

Under Customs' laws and regulations, goods that infringe upon rights of trademark owners are classified into two categories. The first category consists of counterfeit merchandise which bears "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127. Usually, "counterfeit merchandise is made so as to imitate a well-known product in all details of construction and appearance so as to deceive customers into thinking that they are getting genuine merchandise." 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 25.01[5][a] (3d ed. 1992).

The second category consists of "merely infringing" goods which are not counterfeits but bear marks likely to cause public confusion. This category includes merchandise which bears a mark that "copies or simulates" a registered mark so as to be likely to cause the public to associate the copying or simulating mark with the registered mark. *See* 15 U.S.C. § 1124; 19 C.F.R. § 133.21; *see also Montres Rolex, S.A. v. Snyder,* 718 F.2d 524, 527–28 (2d Cir. 1983) *cert. denied* 465 U.S. 1100 (1984) (distinguishing copying or simulating mark that is counterfeit mark from

copying or simulating mark that is a merely infringing mark). Also included in this category is merchandise which uses any word, name, symbol, or any combination thereof, in such a manner that is likely to cause public confusion as to the origin, sponsorship, or approval of the merchandise by another person. *See* 15 U.S.C. § 1125(a)(2).

The significance of the distinction between counterfeits and merely infringing goods lies in the consequences attached to the two categories. Counterfeits must be seized, and in the absence of the written consent of the trademark owner, forfeited. *See* 19 U.S.C. § 1526(e); 19 C.F.R. § 133.23a(b) (1993). Merely infringing goods, on the other hand, may be seized and forfeited for violating 15 U.S.C. §§ 1124 or 1125. 19 U.S.C. § 1595a(c)(2)(C). Under Customs regulations, merely infringing goods may be imported if the "objectionable mark is removed or obliterated prior to importation in such a manner as to be illegible and incapable of being reconstituted." 19 C.F.R. § 133.21(a), (c)(4).

4. *Whether Plaintiff's Use of Registered Trademarks Constitutes Counterfeit Use:*

Customs determined that plaintiff's use of the word marks "GIORGIO" and "L'AIR DU TEMPS" on the packaging of its own products constituted a counterfeit use of these marks, because plaintiff applied marks "identical to the registered trademarks" to its goods without the authorization of the trademark owners. *Remand Determination,* at 28. The court disagrees.

It is clear that plaintiff's products are not counterfeits. Plaintiff's products GORGEOUS and LOVE BIRDS do not imitate the well-known products GIORGIO and L'AIR DU TEMPS in all details of construction and appearance. Rather, plaintiff uses the marks "GIORGIO" and "L'AIR DU TEMPS" to market its products GORGEOUS and LOVE BIRDS.

The use of another person's trademark in the context of marketing one's own product is not prohibited by law unless it creates a reasonable likelihood of confusion as to the source, identity, or sponsorship of the product. *See Saxlehner v. Wagner,* 216 U.S. 375, 380–81 (1910) (permitting seller of mineral water to use competitor's trademark denoting geographical source to truthfully state he was selling water identical in content to that of trademarked water); *G.D. Searle & Co. v. Hudson Pharm. Corp.,* 715 F.2d 837, 842 (3d Cir. 1983) (holding manufacturer of laxative may refer to its competitor's trademark on its own product packaging to characterize its own product as "equivalent" to competitor's product); *Saxony Prods., Inc. v. Guerlain, Inc.,* 513 F.2d 716, 722 (9th Cir. 1975) (holding Saxony may use Guerlain's trademark SHALIMAR to apprise consumers that its fragrance product is "like" or "similar" to SHALIMAR, provided such representation is truthful and that consumer confusion is not likely to result); *Smith v. Chanel, Inc.,* 402 F.2d 562, 563 (9th Cir. 1968) (holding that perfume manufacturer who copied unpatented product sold under trademark may use trademark in his advertising to identify copied product). Customs' practice shows its

acceptance of this principle. *See e.g.*, C.S.D. 89–172, 3 Cust. B. & Dec. 547, 549 (1988) (holding that reference to trademarks NINTENDO and NINTENDO ENTERTAINMENT SYSTEM on packages for video game joystick to indicate its compatibility with NINTENDO system is permissible); C.S.D. 79–318, 13 Cust. B. & Dec. 1476, 1477 (1978) (holding that packaging of doll clothes referring to trademarked doll name would not infringe upon rights of trademark owner of doll name).

Thus, at issue is not whether plaintiff may use the marks "GIORGIO" and "L'AIR DU TEMPS" on the packaging of its own products, but whether such use is likely to cause consumer confusion. If a likelihood of confusion exists, plaintiff's use of the marks would constitute trademark infringement, but not a counterfeit use of the marks.

In reaching the conclusion that plaintiff's use of the marks constitutes a counterfeit use, Customs misapplied 15 U.S.C. § 1127, which defines a counterfeit as a spurious mark "identical with, or substantially indistinguishable from, a registered mark." According to Customs, any reference to another person's mark in the context of marketing one's own goods (whether a parallel use or comparative advertising) would constitute counterfeit use if a likelihood of confusion is found. This is because, under Customs' reasoning, the mark used in such a context would be necessarily "identical" to the registered mark. Customs' application of the statutory definition of counterfeit ignores the distinction between counterfeit and mere infringement, and therefore is not in accordance with law.

5. *Whether Plaintiff's Use of Registered Trademarks Constitutes Infringement:*

Having held that plaintiff's use of the marks "GIORGIO" and "L'AIR DU TEMPS" does not constitute a counterfeit use, the court must now address whether such use nevertheless infringes the rights of the trademark owners.

The basic test for statutory trademark infringement is "likelihood of confusion," which has been construed by courts to mean a probability of confusion rather than a possibility of confusion. *See* 2 McCarthy on Trademarks and Unfair Competition § 23.01[3][a]. In order to determine whether a likelihood of confusion exists, courts apply and balance multiple factors. *Id.* § 23.03[1]. The commonly used factors include: the degree of resemblance between the conflicting marks; the similarity of the marketing methods and channels of distribution; where the goods are not directly competitive, the likelihood that the senior user will expand into the field of the junior user; the degree of distinctiveness of the mark; the characteristics of the prospective purchasers and the degree of care they exercise; the intent of the alleged infringer; and evidence of actual confusion. *Id.*

Although courts may also consider an alleged infringer's use of a disclaimer stating that it is not connected with the trademark owner, the mere presence of a disclaimer does not necessarily prevent consumer confusion. *Id.* § 23.15[9]. In fact, under certain circumstances, use of a

disclaimer may even aggravate brand confusion. *See E. & J. Gallo Winery v. Gallo Cattle Co.*, 1989 U.S. Dist. LEXIS 7950, 12 U.S.P.Q.2d (BNA) 1657 (E.D. Cal. 1989), *modified*, 955 F.2d 1327 *and amended* 967 F.2d 1280 (9th Cir. 1992). Generally, the relative location and size of the disclaimer within the overall context of the advertisement is an important consideration in evaluating the effectiveness of a disclaimer. For instance, in *Charles of the Ritz Group v. Quality King Distributors*, 832 F.2d 1317 (2d Cir. 1987), where the packaging of the fragrance "Omni" used the trademark "Opium" in its comparative advertising slogan, while simultaneously mimicking Opium's trade dress and scent, the court held that the disclaimer, which was in a smaller type size and located in a less prominent position than the words "Omni" and "Opium," was inadequate to obviate consumer confusion. *See also Soltex Polymer Corp. v. Fortex Indus., Inc.*, 832 F.2d 1325, 1330 (2d Cir. 1987) (noting that use of disclaimer may be sufficient where likelihood of confusion is "minimal or moderate"); *University of Georgia Athletic Ass'n v. Laite*, 756 F.2d 1535, 1547 (11th Cir. 1985) (holding relatively inconspicuous disclaimer ineffective); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1277 (S.D.N.Y. 1990) (holding disclaimer ineffective in part because of relative location and size).

In this case, Customs applied commonly accepted factors,[2] and determined that the use of the marks "GIORGIO" and "L'AIR DU TEMPS" on the packaging of GORGEOUS and LOVE BIRDS is likely to cause confusion, and that the disclaimers on the packaging are insufficient to dispel the likelihood of confusion. *Remand Determination*, at 28. Plaintiff agrees that the factors Customs used to determine the likelihood of confusion are appropriate. Plaintiff asserts, however, that Customs incorrectly applied these factors to the two packages, and that Customs was arbitrary in finding the disclaimers ineffective.

Upon examining the record, which contains photocopies and samples of GIORGIO and L'AIR DU TEMPS products as well as plaintiff's proposed packaging, the court sustains Customs' finding of likelihood of confusion.

a. "GIORGIO" v. "GORGEOUS":

Applying the list of factors relevant to the determination of likelihood of confusion, Customs found the following:

(a) The word mark "GIORGIO," as used on fragrance and toiletry products, is inherently distinctive, and is therefore a strong mark entitled to a broad scope of protection. *Remand Determination*, at 12.

(b) "GORGEOUS" and "GIORGIO" are used on identical product—perfumes and toiletries are listed in the same class (International Class—3) for the purposes of the Trademark Office. This factor enhances the likelihood of confusion. *Id.*

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[2] Customs applied the list of factors first enumerated in *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir.) *cert. denied*, 368 U.S. 820 (1961).

(c) There is a high degree of similarity between the two packages. GIORGIO is covered by a pattern of alternating vertical white and yellow stripes; GORGEOUS by a pattern of alternating diagonal white and yellow stripes, of the same width as the GIORGIO stripes. GIORGIO has the red, black, and gold GIORGIO crest; GORGEOUS a red and gold crest. On the GIORGIO packaging, the word "GIORGIO" appears slightly above the center of the front panel and in close proximity to the GIORGIO crest; on the GORGEOUS packaging, the word "GORGEOUS" also appears slightly above the center of the front panel and in close proximity to its crest. In addition, the words "GORGEOUS" and "GIORGIO" share consonants, vowels, and sounds in their pronunciation. *Id.* at 15–16.

(d) The fact that plaintiff selected and combined the three design elements utilized on GIORGIO boxes for use on its packaging (the word mark "GIORGIO," the image of a crest, and the yellow and white stripes), and the fact that the word mark "GIORGIO" appears in a prominent location on the front panel and in a darker and bigger print than the surrounding language inviting comparison, strongly suggest that plaintiff intentionally designed its packaging to be similar to GIORGIO, and thus did not develop its design in good faith. *Id.* at 14–15.

(e) Since the quality of GORGEOUS is not comparable to that of GIORGIO, GORGEOUS would be sold in discount and low-end retail stores, whereas GIORGIO is normally sold in boutiques and fine department stores. However, there is a possibility GIORGIO would be sold in the same store as GORGEOUS. Customs' survey revealed that both GIORGIO and plaintiff's products were sold by a Wal-Mart store, and that a major retail drug store chain sold both GIORGIO products and various brands of "smell-alike" products. The possibility that the two products could be sold in the same stores enhances the likelihood of confusion. *Id.* at 12–13.

(f) While a typical buyer of GIORGIO products may be expected to exercise care before purchasing because of the higher prices involved, a typical buyer of GORGEOUS would be less likely to make more than a cursory inspection of the product because low-priced items are often the subject of impulse purchasing. The nature of plaintiff's product as a target of impulse purchasing enhances the likelihood of confusion. *Id.* at 13.

On balance, Customs found the factors that enhance the likelihood of confusion outweigh the factors that diminish the likelihood of confusion. Therefore, "there is a substantial likelihood that consumers could be confused as to the source of the Ross product." *Id.* at 16.

Customs then examined whether the disclaimer used is sufficient to eliminate the confusion. Customs found that the disclaimer on the package of GORGEOUS is located at the bottom of the front panel, far from the word mark "GIORGIO" which appears in a prominent position at the top of the panel, and that the disclaimer is written in a smaller type size than any other words on the box. Customs concluded that the dis-

claimer could be easily overlooked by consumers and therefore is insufficient to dispel the likelihood of confusion. *Id.* at 18.

The court holds that Customs properly applied the relevant factors in determining a likelihood of confusion, and that Customs' examination of the adequacy of the disclaimer was consistent with the applicable law. Although the court may not necessarily come to the same conclusion if reviewing the case de novo,[3] it finds there is a rational connection between the facts found and the determination made by Customs.

The court sustains Customs' finding of a likelihood of confusion with respect to plaintiff's packaging for GORGEOUS. Accordingly, packages identical to that of GORGEOUS shall be denied entry and, if imported, are subject to seizure and forfeiture under 19 U.S.C. § 1595a(c).

b. "L'AIR DU TEMPS" v. "LOVE BIRDS":

Customs applied the same list of factors in determining the likelihood of confusion with respect to plaintiff's proposed packaging for LOVE BIRDS. Customs found:

(a) The word mark "L'AIR DU TEMPS" as used on fragrances is inherently distinctive, and therefore is a strong mark entitled to broad protection. *Remand Determination,* at 22.

(b) "LOVE BIRDS" and "L'AIR DU TEMPS" are used on identical products—perfumes, cosmetics/toiletries. This factor enhances the likelihood of confusion. *Id.*

(c) There are several similarities between the two packages: the yellow background; the oval on the front panel; and birds in flight within the oval. *Id.* at 23.

(d) On plaintiff's package, the words "LOVE BIRDS" appear faintly, whereas the mark "L'AIR DU TEMPS" appears in black ink against a yellow background in a prominent location at the top of the front panel. Further, the word mark "L'AIR DU TEMPS" is in a bigger and bolder type than the rest of the language inviting comparison; the disclaimer is printed in the smallest lettering and placed at the bottom of the front panel. These factors together strongly suggest that plaintiff attempted to create the packaging to remind consumers of the trademark owner's product. *Id.* at 23–24.

(e) In its survey of local stores, Customs did not find any that sold both L'AIR DU TEMPS and plaintiff's products. This factor diminishes the likelihood of confusion. *Id.* at 22.

(f) The nature of plaintiff's products as a target of impulse purchasing enhances the likelihood of confusion. *Id.*

On balance, Customs found the factors that enhance the likelihood of confusion outweigh the factors that diminish the likelihood of confusion. Based on the similarities in the overall appearance of the two pack-

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[3] Because plaintiff filed a Rule 56.1 motion seeking judicial review upon the agency record, the issue of whether the court has de novo review in this action was not raised. Depending upon the particular circumstances of the case, the court may have de novo review in an action brought under 19 U.S.C. § 1581(h). *See* 28 U.S.C.A. § 2640(e), 5 U.S.C. § 706(a)(F).

ages, Customs found that the disclaimer used is not sufficient to eliminate the likelihood of confusion. *Id.* at 23–24.

The court finds that Customs properly applied the relevant factors and examined the effect of the disclaimer in determining a likelihood of confusion. Customs' finding of a likelihood of confusion shows a rational connection with the facts found. In accordance with the applicable standard of review, the court must sustain Customs' determination.

The court holds that plaintiff's packaging for LOVE BIRDS infringes upon the rights of the trademark owner of "L'AIR DU TEMPS" under 15 U.S.C. § 1125(a). Importation of packages identical to that of LOVE BIRDS may therefore be subject to seizure and forfeiture in accordance with 19 U.S.C. § 1595a(c).

CONCLUSION

For the reasons stated above, the court holds that Customs' determination that plaintiff's proposed packages of GORGEOUS and LOVE BIRDS infringe the rights of the trademark owners of "GIORGIO" and "L'AIR DU TEMPS" is not arbitrary, capricious, or an abuse of discretion, and is otherwise in accordance with law.

Further, the court holds Customs' conclusion that plaintiff's use of the trademarks "GIORGIO" and "L'AIR DU TEMPS" is a counterfeit use is not in accordance with law.

(Slip Op. 94–162)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., INTERVENOR

Court No. 92–03–00156

(Dated October 13, 1994)

ORDER

TSOUCALAS, *Judge:* Upon consideration of defendants' consent motion for modification of this Court's opinion of July 21, 1994, Slip Op. 94–119, and accompanying remand order, it is hereby

ORDERED that, in light of *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United States*, No. 93–1525 and 93–1534, slip op. (Fed. cir. Sept. 30, 1994), Slip Op. 94–119 and the accompanying remand order are modified to make clear that the Department of Commerce properly treated U.S. direct selling expenses in exporter's sales price transactions as a reduction of United States price pursuant to 19 U.S.C. § 1677a(e)(2) and is not required, upon remand, to add the U.S. direct selling expenses to foreign market value.

(Slip Op. 94–163)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., INTERVENOR

Court No. 92–03–00169

(Dated October 13, 1994)

ORDER

TSOUCALAS, *Judge:* Upon consideration of defendants' consent motion for modification of this Court's opinion of July 29, 1994, Slip op. 94–123, and accompanying remand order, it is hereby

ORDERED that, in light of *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United States,* No. 93–1525 and 93–1534, slip op. (Fed. Cir. Sept. 30, 1994), Slip Op. 94–123 and the accompanying remand order are modified to make clear that the Department of Commerce properly treated U.S. direct selling expenses in exporter's sales price transactions as a reduction of United States price pursuant to 19 U.S.C. § 1677a(e)(2) and is not required, upon remand, to add the U.S. direct selling expenses to foreign market value.

Index

Customs Bulletin and Decisions
Vol. 28, No. 44, November 2, 1994

U.S. Customs Service

Treasury Decisions

Drawback decisions, synopses of:	T.D. No.	Page
Manufacturers:		
Air Products and Chemicals, Inc.	94–83–A	7
Amoco Chemical Co.	94–82–A	1
Amoco Performance Products, Inc.	94–82–B	1
ARCO Chemical Co.	94–82–C, 94–83–B	2,8
Canon Virginia, Inc.	94–83–C	8
Carbide Alloys, Inc.	94–83–D	8
Carboloy Inc.	94–83–E	8
Chem-Fleur, Inc.	94–82–D,E	2,2
Chromatic Technologies, Inc.	94–83–F	8
Citrus World, Inc.	94–82–F	2
Dryden Oil Co., Inc.	94–83–G	8
Du Pont Agrichemicals Caribe, Inc.	94–83–H	9
Elf Lubricants North America, Inc.	94–83–I	9
Everfresh Beverages, Inc.	94–82–G	2
Fairmount Chemical Co., Inc.	94–83–J	9
Fieldcrest Cannon, Inc.	94–82–H	3
General Tire, Inc.	94–83–K	9
Hercules Inc.	94–82–I	3
Heublein Inc., d/b/a Heublein Wines	94–82–J	3
Himont U.S.A., Inc.	94–83–L	9
Hoechst Celanese Corp.	94–82–K	3
Keuchel Associates	94–83–M	10
Lilyblad Petroleum, Inc.	94–83–N	10
Lubricating Specialties Co.	94–83–O	10
Lunt Manufacturing Co., Inc.	94–83–P	10
Lykes Pasco, Inc.	94–82–L	3
Mead Johnson & Co. d/b/a Bristol-Myers Squibb USPNG	94–82–M	4
Merck & Co., Inc.	94–83–Q	10
Mobil Chemical Co., Div. of Mobil Oil Corp.	94–82–1	7
Monsanto Co.	94–82–N	4
PWA DECOR Inc.	94–82–O	4
Paralube, Inc.	94–83–R	10
QST Industries, Inc.	94–83–S	11
Reading Alloys, Inc.	94–82–P	4
Rhône-Poulenc Inc.	94–82–Q, 94–83–T	4,11
Rotuba Extruders, Inc.	94–83–U	11
Sanofi Bio-Industries, Inc.	94–82–R	5
Seneca Foods Corp.	94–82–S,T	5,5

Drawback decisions, synopses of—*continued*:	T.D. No.	Page
Manufacturers—*continued*:		
Shell Oil Co.	94–83–V	11
Shieldalloy Metallurgical Corp.	94–82–U	5
SmithKline Beecham Corp.	94–82–V	5
Stepan Co.	94–82–W	6
Uniroyal Chemical Co., Inc.	94–83–W	11
Zeneca Inc.	94–82–Y,Z, 94–83–X,Y,Z	6,6, 12,12,12
Zeneca Inc., Zeneca Pharmaceuticals Group	94–82–X	6
Merchandise:		
Acetoxyazetidinone	94–83–Q	10
Additives, lube	94–83–V	11
Alkylate MX1945	94–82–W	6
Aluminum powder	94–82–U	5
Aluminum tris (o-ethyl phosphonate)	94–82–Q	4
Amino pheno-beta-oxyethylsulfone	94–82–K	3
7-Aminocephalosporanic acid	94–82–V	5
Aramid yarns	94–83–F	8
Avadex BW technical	94–82–N	4
Benzoxazolone	94–82–K	3
Biphenol	94–82–B	1
Butyl(RS)-2-(4((5-trifluromethyl)-2-pyridinyl) oxy) phenoxy) propanoate	94–83–Y	12
Carbide powders, nonagglomerated metal	94–83–E	8
2-carbomethoxybenzene sulfonyl isocyanate	94–83–H	9
Catalysts	94–83–L	9
Cellulose acetate ester unplasticized	94–83–U	11
6-chloro-2-2-hydroxy-quinoxaline	94–83–W	11
Chromium metal, lump, flake or powder	94–82–U	5
Cotton yarn	94–82–H	3
Cranberry juice, unsweetened concentrated	94–82–L	3
Curative	94–83–C	8
Cyanopropionaldehyde dimethyl acetal	94–83–A	7
Cysteamine HCL	94–83–Q	10
7-D-mandel-amidocephalosporanic acid, ethanolate	94–82–V	5
Didanosine (dideoxyinosine)	94–82–M	4
Diphenylamine	94–82–Y	6
Disodium salt	94–82–V	5
4,4′-diaminostilbene-2,2′,-disulfonic acid	94–83–J	9
Diisopropylethylamine	94–83–Q	10
Dimethylformamide	94–83–Q	10
Ethyl lactate	94–83–W	11
Ethylene	94–83–L	9
Flavonic acid	94–83–J	9
Fluazifop-p-butyl	94–83–Y	12
Formyl mandeloyl chloride	94–82–V	5
Fosetyl-AL technical	94–82–Q	4
Grape juice concentrate:		
Red	94–82–J,S	3,5
White	94–82–G,T	2,5
Greige cord 1890 ½	94–83–K	9
Hedione	94–82–D	2
Isobutane	94–83–B	8
Isoprenol	94–82–E	2
Lambdacyhalothrin	94–82–Z	6
Lisinopril dihydrate	94–82–X	6
Magnesium alloy die casting ingot	94–83–P	10
Manganese metal, lump, flake or powder	94–82–U	5

Drawback decisions, synopses of—*continued*:	T.D. No.	Page
Merchandise—*continued*:		
Melt tape, hot	94–83–C	8
Metaxylene	94–82–A	1
Methyl chloride	94–83–X	12
3-methyl-3-butenyl-1-ol	94–82–E	2
Nylon copolymer pellets	94–83–M	10
Nylon fabric and yarn	94–83–K	9
Oil additive concentrates, marine	94–83–G,I, N,O,R	8,9, 10,10,10
Oils, stock	94–83–V	11
Optical fibers	94–83–F	8
Orange juice for manufacturing, concentrated	94–82–F,G	2,2
PP993-tefluthrin	94–83–Z	12
Para-hydroxybenzoic acid (PBHA)	94–82–B	1
Para-nitrobenzyl acetoacetate	94–83–Q	10
Para toluene sulfonyl chloride	94–83–W	11
Phenylhexanol	94–82–D	2
Piece goods	94–83–S	11
Printed	94–82–H	3
Polybutylene terephthalate	94–83–F	8
Pre-polymer	94–83–C	8
Propane/propylene mix	94–82–1	7
Propylene	94–83–B,L	8,9
Oxide	94–82–C	2
Refinery gas	94–82–1	7
Rosins, gum, pale wood and tall oil	94–82–I	3
Sodium azide	94–83–Q	10
Sodium iodide USP special	94–83–Q	10
Tetrazole sulfonic acid	94–82–V	5
Titanium dioxide, rutile	94–82–O	4
1,3,5-triazine,2-methyl-4-methoxy-6-methylamino	94–83–H	9
2,3,3-Trichloroallyl diisopropylthiocarbamate	94–82–N	4
Trimethylchlorosilane	94–83–Q	10
Tungsten carbide powder, cemented	94–83–D	8
Vanadium pentoxide, fused flake	94–82–P	4
Xanthan gums	94–83–T	11
Zinc bromide anhydrous	94–83–Q	10

General Notice

	Page
Customs broker permit user fee; annual fee for 1995 due January 3, 1995	13

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Koyo Seiko Co., Ltd. *v.* United States	94–162, 94–163	42,43
Laclede Steel Co. *v.* United States	94–160	15
Ross Cosmetics Distribution Centers, Inc. *v.* United States	94–161	31

U.S. G.P.O. 1994–301–610–00008